Before the
Federal Communications Commission
Washington DC 20054

In the Matter of	)	
	)	
Implementation of the Cable Television	)	
Consumer Protection and Competition	)	
Act of 1992	)	
	)	CS Docket No. 01-290
Development of Competition and Diversity	)	
in Video Programming Distribution:	)	
Section 628(c)(5) of the Communications	)	
Act:	)	
	)	
Sunset of Exclusive Contract Prohibition	)	

REPLY COMMENTS OF BROADBAND SERVICE PROVIDERS ASSOCIATION

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Dated: January 7, 2002

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The Broadband Service Providers Association ("BSPA") hereby submits these reply comments in response to the Commission's Notice of Proposed Rulemaking.[1]

INTRODUCTION AND SUMMARY

In response to its *NPRM* regarding whether the prohibition on exclusive contracting arrangements between cable operators and cable-affiliated programmers should be allowed to sunset pursuant to Section 628(c)(5),[2] the Commission received an overwhelming number of comments concurring with BSPA that the exclusivity prohibition remains *absolutely* critical to the entry of competitive multichannel video programming distributors ("MVPDs"), and that, if the prohibition is allowed to sunset, competitive providers of multichannel video programming,

[1] Notice of Proposed Rulemaking, *Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, FCC 01-307, CS Docket No. 01-290 (rel. Oct. 18, 2001)("*NPRM*").

[2] *Id*. ¶ 8.

including broadband providers, will be unable to secure the high quality, popular content that is the cornerstone to their bundled, multichannel video offerings.[3] It is evident from these filings that, without access to such content, the deployment of new facilities-based broadband networks will be stifled.

While BSPA agrees with the Commission's observation that the exclusivity prohibition was intended to "allow[] a *transition* to a competitive market,"[4] and that "Congress envisioned a time in which . . . [it] would be[come] unnecessary,"[5] BSPA concurs with numerous other commenters that the "transition" the Commission speaks of has yet to occur and, thus, the time when the prohibition becomes unnecessary has not arrived.[6] Although some strides have been made towards a fully competitive market, the Commission's *Seventh Annual Report* clearly demonstrates that the market for the delivery of video programming "continues to be highly concentrated and characterized by substantial barriers to entry,"[7] leaving "most consumers [with] limited choices."[8] Indeed, the conditions that surrounded the MVPD industry ten years ago, circumstances that initially prompted Congress to take action, still very much exist today.

The majority of commenters in this proceeding list statistic after statistic, anecdote after anecdote, evidencing cable operators' continued dominance and market power, and how they are

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[3] *See* Comments filed by American Cable Association ("ACA"), American Public Power Association ("APPA"), Broadband Service Providers Association ("BSPA"), Carolina BroadBand, Inc. ("Carolina BroadBand"), Competitive Broadband Coalition ("CBC"), DIRECTV, Echostar Satellite Corporation ("Echostar"), Gemini Networks, Inc. ("Gemini Networks"), Independent Multi-Family Communications Council ("IMCC"), Joint Comments, National Rural Telecommunications Cooperative ("NRTC"), Qwest Broadband Services, Inc. ("Qwest"), RCN Telecom Services, Inc. ("RCN"), Rural Independent Competitive Alliance ("RICA"), World Satellite Network, Inc ("WSN").

[4] *NPRM* ¶ 5 (emphasis added).

[5] *Id*. ¶ 7.

[6] *See* Carolina BroadBand at 2, RCN at 26-28, DIRECTV at 4, Echostar at 4; *see also*, *supra*, n. 3.

[7] Seventh Annual Report, *Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, FCC 01-1, CS Docket No. 00-132, ¶ 137 (rel. Jan. 8, 2001)("*Seventh Annual Report*").

[8] *Id*. ¶ 138.

able to use their market power to preclude competitive providers, including broadband providers, from securing the critical programming needed to compete effectively.[9] BSPA members have also experienced first hand great difficulties obtaining this programming, and have often been unable to obtain access altogether.[10] These filings speak volumes, and despite the feeble attempt made by cable operators to paint a competitive landscape using tired, old arguments that have repeatedly been rejected by Congress and the Commission, the current state of the MVPD marketplace does not warrant the sunset of the exclusivity prohibition.

In addition, like BSPA, several other commenters recognize that particular types of cable-affiliated, "marquee" programming, namely regional sports programming, is crucial to the provision of any competitive multichannel video offering, and that cable operators are consistently precluding competitors from obtaining access to this programming by "migrating" it to their regional-fiber networks. These commenters agree that now is the time for the Commission to take steps to ensure that (among other things) the exclusivity prohibition applies to *all* cable-affiliated programming services, regardless of the mode of delivery.[11]

In sum, if we are to achieve the goals established by Congress in both the 1992 Cable Act and the Telecommunications Act of 1996 (the "Act"), including nationwide ubiquitous broadband deployment, which Chairman Powell has deemed "essential for the nation's survival,"[12] BSPA agrees fully with Echostar that it "would be foolhardy to give the incumbent

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[9] *See* APPA at 4-5, Carolina Broadband at 4, DIRECTV at 6-9, Echostar at 2-6, IMCC at 2-6, Joint Comments at 5-11, Qwest at 4-6, RCN at 19-22, 24-28, RICA at 4-5, WSN at 3.

[10] In addition to the examples set forth in its initial comments, BSPA provides in Exhibit A, hereto, additional selected examples of program access issues faced by its members.

[11] *See* APPA at 6, BSPA at 11-19, Carolina BroadBand at 7-9, Gemini Networks at 4-5, Echostar at 18-19, NRTC at 9-10, RCN at 29-35, WSN at 7-8.

[12] Taylor Lincoln, Potomac Tech Journal, p.2 (Nov. 26, 2001).

cable operators a weapon as powerful as exclusive contracting rights,"[13] yet another gun in incumbents' arsenal to forestall competitive entry.

Accordingly, the Commission should act on the weight of the evidence and extend the prohibition on exclusive contracting until such time that it is no longer needed. Furthermore, the Commission should take this opportunity to address competitive concerns regarding discriminatory and exclusionary conduct involving sports and other cable-affiliated, terrestrially-delivered programming services, without access to which, a new provider's ability to compete would be significantly hindered or prevented altogether.

DISCUSSION

I. THE CURRENT STATE OF THE MVPD MARKETPLACE HAS NOT CHANGED SUFFICIENTLY SINCE ENACTMENT OF THE PROGRAM ACCESS PROVISION AND, THUS, SUNSET OF THE EXCLUSIVITY PROHIBITION IS NOT WARRANTED

If one thing is clear from the history of the program access provisions and the growth of the competitive MVPD industry, it is that access to high quality, popular programming is an essential prerequisite to the ability to compete in the MVPD marketplace.[14] Just as this basic principle was true ten years ago when Congress passed the 1992 Cable Act,[15] it remains ever true today. In fact, given the increasingly high levels of concentration and consolidation in the industry, many have argued that the case is now even more compelling that competitive

[13] Echostar at 6.

[14] *See Examination of Cable Rates: Hearing Before the Senate Commerce, Transportation and Science Comm.*, 105th Cong. (July 28, 1998)("If a competitor couldn't get the programming it certainly wasn't going to launch the [system].")(Statement of Rep. Billy Tauzin); Memorandum Opinion and Order, *Matter of Outdoor Life Network and Speedvision Network*, 13 FCC Rcd 12226, 12235 (1998)("Access to programming is an essential prerequisite to the ability to compete against incumbent cable operators."); Report to Congress, *Matter of Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Serv.*, 5 FCC Rcd 4962, 5021 (1990)("Ensuring fair and equitable program access is the key to fostering the development of vigorous multichannel competitors to cable.").

[15] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 ("1992 Cable Act").

providers, including broadband providers, simply cannot compete without access to such important programming.[16] As recognized by BSPA member RCN, video programming is (and always has been) undeniably the "single most important selling point" to multichannel video subscribers.[17]

Just as access to popular programming is equally as essential to competitive providers as it was in 1992, unfortunately, cable operators' "stranglehold" on such programming remains just as strong as well.[18] Even though competitors have made some in-roads, local programming distribution markets remain highly concentrated, and the vertical relationships that dominated the market in 1992 have become further entrenched. As BSPA and several other commenters cited in their filings, more than one-third of all national programming networks are currently vertically integrated with at least one MSO, with nine of the top 20 video programming services in terms of subscribership, and 11 of the top 20 services in terms of prime time ratings, being affiliated with cable operators.[19]

Furthermore, BSPA and other commenters agree with IMCC that vertical integration is "especially acute" with respect to regional sports programming services, "the significance of which can hardly be overstated."[20] "Given the unique nature of all local sports and its tremendous appeal to local audiences, it is essential that any would-be MVPD competitor have

[16] *See* ACA at 4, APPA at 5, Carolina BroadBand at 4, CBC at 7, IMCC at 2, Joint Comments at 1-2, RCN at 11-12.

[17] RCN at 26.

[18] *See* BSPA at 6-9, Carolina BroadBand at 5, CBC at 6, DIRECTV at 3, IMCC at 4, NRTC at 5, Qwest at 5-6, WSN at 4-5.

[19] *Id*.

[20] IMCC at 4; *see also* BSPA at 11-14, Joint Comments at 11-15, RCN at 11-19.

access to such programming in order to establish a viable presence in any particular market."[21] Gaining access to this highly popular, cable-affiliated programming has become increasingly difficult if not impossible in many areas across the country.

When enacting the program access provision in the 1992 Cable Act, including the prohibition on exclusive contracts, Congress understood all too well what this level of vertical integration meant in practice. Simply stated, Congress recognized that vertical integration provides cable operators with "the *incentive and ability* to favor their affiliated programmers."[22] Indeed, as Echostar points out, again with regard to the all important sports programming mentioned above, "[n]othing better illustrates the cable industry's desire and ability to withhold key programming than in the area of vertically integrated regional sports networks, where cable operators have been willing to forego substantial potential revenue in an effort to hobble a competitor."[23] Because incumbent operators were (and are) consistently and continually acting on this ability to the detriment of competitive providers, Congress believed that the program access provisions were required to "level the playing field."

Moreover, exacerbating the anti-competitive effects stemming from the chronic level of vertical integration that remains in the industry, concentration, clustering and consolidation also stand to reach unprecedented levels, far beyond that which existed in 1992. For example, the ten largest cable operators now serve close to 90% of all subscribers, an eight-percent increase over 1999,[24] and two-thirds of all cable subscribers are now being served by system "clusters."[25] In addition, if the recently announced merger of the number one (AT&T) and number three cable

[21] IMCC at 4.

[22] 1992 Cable Act, § 2(a)(5)(emphasis added).

[23] Echostar at 5.

[24] *Seventh Annual Report* ¶¶ 15, 169.

[25] *Id*. ¶ 15.

operator (Comcast) is approved, the combined company (which will be almost twice the size of its next largest competitor), will serve 22 million subscribers, have a major presence in 17 of the top 20 largest cities, and operate in 41 states across the country.[26]

As the Commission has recognized, this level of market power and concentration of ownership among cable operators directly impacts access to programming because it increases cable operators' buying power and facilitates their ability to coordinate anti-competitive conduct.[27] Indeed, it is "precisely this combination of cable's market power and control of programming networks that led to the enactment of Section 628(c)(2)'s prohibitions on exclusive contracting arrangements . . ." in the first place.[28]

Thus, contrary to the obviously self-serving claims made by cable operators that the MVPD market is "highly," "vigorously," or "vibrantly" competitive,[29] in reality, while facilities-based competition from BSPA members places significant competitive pressure on incumbent operators in those markets where they have entered, the "vigorous competition" that cable operators tout comes only from a single source – DBS. In short, cable operators still enjoy overwhelming market dominance in most local markets, and the gradual reduction in their

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[26] Brigette Greenberg, *Agreement Merges Nation's First, Third Largest Cable Competitors*," Communications Daily (Dec. 20, 2001). Indeed, as noted by a Yankee Group analyst, "[w]ith more than a quarter of all multichannel video subscribers, AT&T Comcast will be in a strong position to negotiate concessions from programmers and vendors." *Comcast/AT&T: Gentleman, Start Your Upgrades*, CT's Pipeline (Society of Cable Television Engineers), Jan. 2, 2002 (www.cabletoday.com/ctp_email).

[27] *See* Joint Comments at 5 (citing *Implementation of Section 302 of the Telecommunications Act of 1996 - Open Video Systems*, 11 FCC Rcd 18223, 18322 (1996)). *See also* Further Notice of Proposed Rulemaking, *Matter of Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, FCC 01-263, CS Docket No. 98-82, ¶ 30 (rel. Sept. 21, 2001); First Report and Order, *Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992: Development of Competition and Diversity in the Video Programming Distribution and Carriage*, 8 FCC Rcd 3359, 3365-66 (1993)("*First Report and Order*")("The 1992 Cable Act and its legislative history reflect congressional findings that horizontal concentration in the cable television industry, combined with extensive vertical integration, has created an imbalance of power . . . between incumbent cable operators and their multichannel competitors. . . .").

[28] DIRECTV at 4.

[29] AT&T at 16-22, Cablevision at 20-29, Comcast at 4-7, NCTA at 4-11.

market share since the passage of the 1992 Cable Act has not been sufficient to blunt their ability to inhibit competitive entry.

In sum, when adopting the prohibition on exclusive contracting and the corresponding sunset provision, Congress plainly intended that the Commission look at any changes in the market over a ten year period to see whether circumstances that led to the prohibition's adoption had changed to such a degree that the ban was no longer necessary. The bulk of the comments filed in this proceeding make a compelling case that, in fact, ten years has not been enough time to achieve a competitive market and, thus, the exclusivity prohibition undeniably continues to be as vital and as necessary today as Congress recognized it was in 1992.[30]

Accordingly, and for the foregoing reasons, the purpose of the 1992 Cable Act -- to "ensure that cable television operators do not have undue market power vis-à-vis video programmers and consumers"[31] -- remains a valid one. Simply stated, allowing the exclusivity prohibition to sunset will absolutely stifle new facilities-based entry from the competitive broadband industry.

II. THE COMMISSION SHOULD ONCE AGAIN REJECT THE CABLE INDUSTRY'S ARGUMENTS THAT CONGRESS PREVIOUSLY REJECTED WHEN ENACTING THE PROGRAM ACCESS PROVISIONS

Cable operators have, once again, simply recycled the very same arguments that Congress previously rejected when enacting the program access provisions. Just as the Commission also previously rejected these arguments when denying all but two petitions for waiver of the exclusivity prohibition, it should do so here as well as conditions in the MVPD marketplace justify no other outcome.

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[30] *See*, *supra*, n. 3.

[31] 1992 Cable Act, § 2(b)(5).

A. Cable Operators' Arguments that the Exclusivity Prohibition Distorts the Market, Allows Free Riding, and Discourages Investment in New Programming are Unfounded

The cable industry complains that the exclusivity prohibition distorts the market, imposes significant costs on the industry by allowing competitors to "free ride" off the investment of incumbent operators, and discourages new investment in additional programming services.[32] As shown below, these assertions are unfounded and fly in the face of the reality of the MVPD market.

First, cable operators' assertion that competitive MVPDs are "free riding" off the industry's investment in programming is disingenuous. To the contrary, competitive MVPDs pay significant fees to video programmers to secure distribution rights to their programming networks. Such fees, even assuming a competitive programming supply market, are set at levels sufficient to allow programmers to recoup the investment and development costs associated with the supply of such programming. Furthermore, while asserting that the "explosion of new cable programming services in the 1980s . . . was funded principally by cable operator investment at a time when the extraordinary ban on exclusivity was not in effect,"[33] Cablevision, for example, ignores the fact that it was precisely the industry's "stranglehold" over these new programming services, as well as incumbent operators' ability to strategically use their control as a competitive weapon to foreclose access, that necessitated the enactment of Section 628.

Second, cable operators argue that the prohibition on exclusive arrangements discourages programming investment by DBS and other non-incumbent MVPDs.[34] However, this assertion

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[32] *See* AT&T at 8, 10-12, Cablevision at 10-15, Comcast at 9-14, NCTA at 17.

[33] Cablevision at 14 (citing marquee programming services such as HBO, Showtime, AMC, MTV, CNN, Bravo, BET, Comedy Central, Discovery, TNT).

[34] *See* AT&T at 10-12, Cablevision at 17, Comcast at 10-11, NCTA at 17.

completely ignores the absolute barrier that required integration into the program marketplace would have on smaller MVPDs, such as BSPA's members.[35] Indeed, the cable industry's prophecy, that removal of the exclusivity ban would lead to greater investment by competitive MVPDs in new programming, is belied by the cold reality that led to the enactment of the program access provisions in the first place. At bottom, as Congress found in enacting Section 628, the cost of vertical integration upstream into program production is a significant impediment to competitive entry. In fact, prior to enactment of the 1992 Cable Act, the absolute lock that the cable industry had on access to programming, and the inability of competitors to create such programming themselves, helped maintain the cable industry's share of the MVPD market well above 95%.

In addition, Cablevision complains that "the exclusivity restrictions have unquestionably prevented it from maximizing the value of its programming assets and expertise."[36] When stripped of its rhetoric and limited to the facts, however, Cablevision's complaint merely focuses on the impact of the exclusivity limitation on its ability to promote its new and fledgling networks.[37] Yet, Cablevision has a remedy for this problem as Section 628 and the Commission's rules provide a vehicle for obtaining a waiver of the exclusivity ban in appropriate circumstances.[38]

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[35] *See* 138 Cong. Rec. H6540 (daily ed. July 23, 1992)(Rep. Eckart)(cable operators "know that if they maintain their stranglehold on this programming, they can shut down competition – *even the deep pockets of the telephone companies for a decade or more.*").

[36] Cablevision at 11.

[37] *See*, *id.* at 11-12.

[38] Indeed, the two exclusivity petitions that have been granted by the Commission have been for new, start-up niche services, precisely the type of services for which Cablevision claims it needs exclusivity the most. *See New England Cable News*, 9 FCC Rcd 3231 (1994); *NewsChannel*, 10 FCC Rcd 691 (1994). While Cablevision and Comcast both complain of the "costs, uncertainties, and timing" of the Commission's waiver process (Cablevision at 6, n.8; Comcast at 12), the answer is not to obliterate the prohibition in toto, but to consider improvements that will make seeking a waiver a "realistic business option" in those limited circumstances where exclusivity might be justified in the public interest.

Finally, AT&T and Cablevision also claim that limitations on exclusivity diminish the ability of cable operators and others to compete through product differentiation, shifting focus of competition to "'non-program dimensions which may be of less benefit to consumers.'"[39] Reality and common sense likewise contradict this theory. As Cablevision itself acknowledges, competitive entry in the distribution market has led cable operators "to devote substantial efforts to improving services and rolling out new offerings in order to retain, win back, or gain new subscribers to their service."[40] Moreover, as the Commission has recognized, where competitors are unable to pursue product differentiation strategies, one dimension they compete on is price. Thus, as the Commission has found, where there is direct, head-to-head competition between cable operators and other terrestrial distributors, there is a significant price component of that competition.[41] That Cablevision's expert would opine that lower prices and improved service is "of less benefit to consumers" is startling, to say the least.

B. Cable Operators' Assertion that Exclusive Arrangements Pose Little Threat to Competition is Patently False

Cable operators offer several arguments why permitting affiliated programmers to engage in exclusive dealing arrangements poses little threat to competition,[42] and how such arrangements can be beneficial, as they are in other media contexts.[43] However, once again, none of these arguments have any validity whatsoever.[44] In particular, Cablevision's assertion,

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[39] Cablevision at 17, n.38 (citing Economists Inc. at 22); *see also* AT&T at 10, 12-13.

[40] Cablevision at 26.

[41] *Seventh Annual Report* ¶¶ 9, 138, 213, 235.

[42] *See* AT&T at 22-25, Cablevision at 29-31, Comcast at 7-9, NCTA at 14-15.

[43] *See* AT&T at 7-10, Cablevision at 5-10, Comcast at 9-10, NCTA at 15-17.

[44] For one, Cablevision's analogy to the broadcast industry is absurd. Pointing to the broadcast industry, Cablevision boldly concludes that "cable network exclusivity is no more harmful – and, in fact, just as helpful – to competition than is exclusivity for programs carried by broadcasters." Cablevision at 35. As the Commission has repeatedly recognized, contrary to the utopian picture painted by the cable industry, local MVPD markets are highly concentrated, in the overwhelming majority of markets with a single terrestrial provider, and two satellite providers.

relying on its expert report, that allowing exclusive arrangements will not harm competition because "the strength and size of competing distributors to cable operators are simply too large for any programmer . . . to shun" is simply not true.[45]

For instance, with respect to terrestrial broadband competitors, like BSPA members, who collectively have just one percent of the market, while, in an ideal world they would be "too large" to be ignored, it is not the case in today's marketplace. And, in fact, even though BSPA members do not have the "strength and size" that Cablevision attributes to them, they are still being ignored. As BSPA noted in its initial comments, BSPA member RCN has been denied access to both Cablevision's MetroChannel and Comcast's SportsNet programming.[46] And as reflected in Exhibit A, hereto, other BSPA members have also been denied access to programming. Furthermore, even with respect to DBS competitors, who certainly do possess the "strength and size" Cablevision speaks of and who would clearly appear to be "too large" to be ignored, in fact, both DirecTV and Echostar have also been denied access to Comcast's SportsNet network in the Philadelphia area.[47] Accordingly, it does not appear that competitive providers, regardless of their "strength and size," are, in reality, ever "too large" to be ignored by cable-affiliated programmers.[48]

In contrast to local MVPD markets, local broadcasting markets, are in fact, highly competitive, consisting of multiple local stations in a given market. Therefore, exclusive arrangements pose little competitive risk.

[45] Cablevision at 29.

[46] *See* BSPA at 12 n.29 and at 17 n.45.

[47] *See* Memorandum Opinion and Order, *DirecTV, Inc. v. Comcast Corp.; Echostar Communications Corp. v. Comcast Corp., Application for Review of Orders of the Cable Services Bureau Denying Program Access Complaints*, FCC 00-404, CSR 5112-P and CSR 5244-P (rel. Nov. 20, 2000).

[48] Cablevision also argues that, if competitive providers are illegally being denied access to programming, the antitrust laws are a sufficient and appropriate remedy. *See* Cablevision at 37-40. As noted by one authoritative law review article on program access, the fallacy of this argument is, of course, that competing MVPDs had "met with little success" in using the antitrust laws to challenge this conduct, which prompted Congress to enact Section 628 in 1992. *See* James W. Olson & Lawrence J. Spiwak, *Can Short-Term Limits On Strategic Vertical Restraints Improve Long-Term Cable Industry Market Performance?*, 13 Cardozo Arts & Ent. L.J. 283, 296 (1995). In

Finally, cable operators claim that even if some cable-affiliated programmers opted for exclusivity, competing MVPDs would still have access to "ample sources" of programming.[49] These operators, however, miss the point as the concern here is not with a single programmer refusing to provide programming to alternative suppliers, but with a return to the "cable friendly" distribution policies across the industry that was the norm in the pre-1992 Cable Act era. Today, of course, non-affiliated programmers are free to engage in exclusive arrangements. If cable-affiliated programming is added to that mix, the threat of exclusion becomes significant. As the Commission recognized in its *First Cable Report*:

> cable operators, using their buying power over programmers, can extract concessions from non-vertically integrated programmers that raise rival operators' costs of obtaining programming or deny them access to programming altogether. Moreover, as the industry becomes further concentrated, the potential for collusion among operators jointly to pressure programmers to adopt what may be broadly thought of as pro-cable distribution policies, may be further enhanced.[50]

Of course, as the Commission has recognized in its most recent competition report, concentration in the industry has increased sharply since the first competition report seven years ago. Thus, the same coordinated conduct that led to pressuring non-affiliated programmers to adopt pro-cable distribution policies, would similarly result in a cable cartel through which affiliated programmers would refuse to deal with competitors or would do so only on discriminatory terms and conditions.

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addition, BSPA agrees with other commenters that antitrust litigation is "not only expensive, time-consuming, and complex, but fraught with uncertainty," and thus an inadequate remedy to address these issues. Echostar at 17.

[49] Comcast at 8; *see also* AT&T at 19-22, Cablevision at 30.

[50] First Report, *Matter of Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992; Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* 9 FCC Rcd 7442, 7552 (1994) ("*First Cable Report*").

C. Cable Operators' Erroneously Assert that the MVPD Market is "Highly Competitive" and the Exclusivity Prohibition is No Longer Needed

According to the cable industry, the "competitive imbalance" that may have justified enacting Section 628 in 1992 no longer exists today as the distribution market is now "vigorously competitive."[51] As discussed in Section I, *infra*, this utopian view is belied by the reality of the MVPD marketplace, as well as the very statistics the industry relies upon for its conclusion. While there is no doubt that facilities-based competition places significant competitive pressure on cable operators in those limited markets where it exists, in virtually every market in the country there is, at most, three providers -- the incumbent cable operator and two DBS providers. With the merger of Echostar and DirecTV, that choice would be reduced to a two-firm oligopoly. Thus, the "highly competitive" market that the cable industry touts, and the anecdotal evidence it adduces in its comments comes from a single source, DBS.[52] Thus, the cable industry's assertion that the MVPD market is "undeniably competitive"[53] and that "the national availability of DBS and . . . other alternative multichannel providers render every local market not just contestable, but contested"[54] is sheer sophistry.

Cablevision and AT&T further argue that, because of this supposedly competitive market, "it would be uneconomic for any vertically-integrated cable programmer to enter into

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[51] Cablevision at 21-22; *see also* AT&T at 16-19, Comcast at 4-7, NCTA at 4-11.

[52] Specifically, Cablevision argues that when the program access provisions were enacted, the cable industry had a 95% share, which today has dropped to 77%, with DBS serving over 18% of the market. *See* Cablevision at 20. What this really means, is that while there has been a significant increase in competitive entry since 1993, when the program access provisions went into effect, that growth has come almost exclusively from DBS, with other competitors to cable having just five percent of the market, which is roughly the same market share as that in 1993. So while, AT&T, Cablevision and NCTA mention in passing competition from BSPA members RCN, WOW, Knology, and Seren Innovations (Astound Broadband), as these members currently have over 22 million homes under franchise and over 1 million subscribers, these entities represent just a one percent share of the MVPD market. *See* AT&T at 17, Cablevision at 23-24; NCTA at 6. Thus, Cablevision and other operators' statistics about the vigorous competition in the MVPD market really come exclusively from DBS.

[53] AT&T at 16.

[54] Cablevision at 26.

exclusivity arrangements solely to raise rivals' costs or foreclose competing distributors."[55] Cablevision also argues that if anti-competitive foreclosure were a serious threat, an effective ban would need to prohibit exclusivity in the sale of all program rights to MVPDs, no matter who owned the rights. In other words, according to Cablevision's expert, the fact that MVPD competition has grown rapidly over the last 10 years despite the fact that the ban applies to only a subset of the programming sold to MVPDs, demonstrates its lack of need.

However, with these arguments, cable operators, including Cablevision and its expert, are not condemning the need for continuation of the exclusivity ban. But, rather, they are challenging its imposition in the first place, and they are doing so, as stated above, with the same arguments that carried no weight in 1992 and carry no weight today. At bottom, for vertical foreclosure strategies to be successful, they need not foreclose access to all programming, or entirely prevent entry. Rather, such strategies are effective to the extent they foreclose access to a critical mass of programming, or access to one or more key brands, the absence of which reduces the appeal of the competitor and drives customers to the incumbent.

In sum, contrary to the cable industry's obviously self-serving and repetitive arguments, the substantial weight of the evidence clearly shows that exclusive arrangements under the conditions that currently exist in the MVPD marketplace absolutely hinder competitive entry, and may preclude it altogether. As the Commission found in the *First Report and Order*,

[55] Cablevision at 20; *see also* AT&T at 19-20, 23-24. According to Cablevision, a foreclosure strategy only works if the operator has sufficient market power to allow it to recoup the costs associated with the foreclosure strategy through rate increases on the distribution side. *See* Cablevision at 32. However, the ability to raise rates above competitive levels is just one of the ways an incumbent using vertical foreclosure strategies can recoup the costs of its "investment." A second, equally compelling way, is through revenue from subscribers it is able to garner from the competitor through successful execution of its foreclosure strategy. Cablevision asserts, in its own case, it could not profitably execute a foreclosure strategy given the size and scope of potentially excluded buyers, relative to the scope of its cable operations. Of course, nothing would prevent Cablevision from limiting its foreclosure to MVPDs that are competing in markets where it has cable operations, or from coordinating its strategy with other cable operators with programming affiliates so as to maximize its effectiveness and limit its cost.

although Congress and the Commission have recognized the benefits of exclusivity in certain circumstances, the 1992 Cable Act "clearly placed a higher value on new competitive entry than on the continuation of exclusive distribution practices that may impede this entry."[56]

Therefore, whatever limited benefits that may or may not exist from exclusive arrangements, these benefits are clearly outweighed, as they were in 1992, by the threat to competition if the exclusivity prohibition were allowed to sunset. Cable operators still have both the "incentive and ability" to withhold important programming, and they continue to do so, leaving consumers with no real choice between truly competitive offerings, including broadband offerings of advanced bundled services. Accordingly, the Commission should once again reject the cable industry's arguments that the prohibition on exclusive arrangements is no longer necessary.

III. A SIGNIFICANT NUMBER OF COMMENTERS ALSO URGE THE COMMISSION TO MAKE CLEAR THAT THE EXCLUSIVITY PROHIBITION APPLIES TO ALL CABLE-AFFILIATED PROGRAMMING SERVICES, REGARDLESS OF THE MODE OF DELIVERY

Much as BSPA is extremely concerned about cable operators ever-growing practice of migrating vital programming, namely regional sports programming, to their terrestrial fiber networks, thereby avoiding the 1992 Cable Act's prohibition on exclusive contract arrangements, several other commenters have urged the Commission to "close the terrestrial loophole" and make clear that the exclusivity prohibition (and other provisions of the program access rules) apply to all cable-affiliated programming services regardless of the mode of delivery.[57]

Currently, given the Commission's program access rules, and its construction of Section 628(b), cable operators can move affiliated satellite programming services to terrestrial delivery,

[56] *First Report and Order* at 3384.

[57] *See*, *supra*, n. 11.

thereby avoiding application of the discrimination and exclusivity provisions of the rules; and they are increasingly doing so, especially with the "marquee" regional sports programming services demanded by a substantial numbers of subscribers. Therefore, in this context as well as with the distribution of satellite programming, cable operators again have both "the incentive and the ability" to use their control over this critical programming to foreclose competitive entry. Indeed, they already have.

As BSPA and BSPA member RCN have explained, Section 628(b) and (c) provide the Commission with ample jurisdiction to adopt rules prohibiting refusals to deal and other discriminatory conduct with respect to terrestrially-delivered, cable-affiliated programming services.[58] There is no dispute that refusals to deal and other discriminatory conduct can constitute unfair competition or unfair acts or practices for the purpose of Section 628(b). Thus, so long as the refusal to deal or other discriminatory conduct involves programming that, if denied, would "hinder significantly or prevent" a competitive MVPD from entering and providing programming to subscribers, the Commission is within its jurisdiction to consider or adopt rules under Section 628(c)(1), specifying such conduct as being prohibited under Section 628(b), regardless of the mode of delivery.[59]

Furthermore, as RCN points out, the Commission has stated that because 628(b) and (c) are ambiguous "it is appropriate to rely on not just the language of the [1992 Cable] Act but also . . . the underlying policy objectives . . .,"[60] which has been described by the Commission as "releasing programming to the existing or potential competitors of traditional cable systems so

[58] *See* BSPA at 12; RCN at 29-36.

[59] *See* BSPA at 19.

[60] RCN at 30.

that the public may benefit from the development of competitive distributors."[61] "It is illogical to conclude that terrestrially distributed programming is not encompassed by . . . [this policy objective] because the policy . . . [is] in no way irrelevant to, or dissipated by, terrestrial distribution."[62] To the contrary, Congress never intended to exclude terrestrially delivered programming from the ambit of Section 628(b), and the fact that the provision merely uses the term "satellite cable programming" does not alter this conclusion.[63]

In fact, the Commission has already indicated that "there may be circumstances where moving programming from satellite to terrestrial delivery could be cognizable under Section 628(b) as an unfair method of competition or deceptive practice if it precluded competitive MVPDs from providing satellite cable programming."[64] Furthermore, the Commission has repeatedly recognized, again as recently as its *Seventh Annual Report*, that "the terrestrial distribution of programming, including in particular regional sports programming, could eventually have a *substantial impact on the ability of alternative MVPDs to compete in the video marketplace*."[65] The time has arrived for the Commission to act. These practices are undoubtedly precluding competitive MVPDs from obtaining and providing critical programming, thereby significantly hindering their ability to compete in the MVPD marketplace. Thus, the question for the Commission is not *whether* it should take action, but *how* and *when*.

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[61] *First Report and Order* at 3365.

[62] RCN at 30-31.

[63] Rather, the term was used because in 1992 it was the *only* method of delivering programming to endusers. *Id*. at 32.

[64] BSPA at 13.

[65] *Seventh Annual Report* ¶ 15 (emphasis added). *See also* Report and Order, *Matter of Petition for Rulemaking of Ameritech New Media Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, 13 FCC Rcd 15822, 15856 (1998)(also recognizing that "the issue of terrestrial distribution of programming could eventually have substantial impact on the ability of alternative MVPDs to compete in the video marketplace").

Accordingly, and for the foregoing reasons, in finding that the exclusivity prohibition should not sunset with respect to cable-affiliated programming services, the Commission must also ensure that the exclusivity prohibition (and other provisions of the program access rules) continue to apply to critical regional cable-affiliated programming services regardless of the mode of delivery.

CONCLUSION

For all the foregoing reasons, and as supported by the overwhelming weight of the evidence, the Commission should extend the sunset date of the prohibition on exclusive contracts as such prohibition continues to be necessary to preserve competition and diversity in the national MVPD marketplace. In addition, the Commission should take this opportunity to address competitive concerns regarding discriminatory and exclusionary conduct involving sports and other cable-affiliated, terrestrially delivered, regional programming services, without access to which, a new provider's ability to compete would be significantly hindered or altogether prevented. BSPA could not agree more with Qwest that "[t]he greatest casualty" if the Commission should fail to take these actions "would be to the local, terrestrial, start-up cable operators," such as BSPA members.[66]

Respectfully submitted,

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[66] Qwest at 6.

EXHIBIT A

SELECTED EXAMPLES FROM BSPA MEMBERS INVOLVING PROGRAM ACCESS ISSUES

WeB Channel

During 1999, BSPA members Knology and ClearSource were both denied access to the WeB Channel, a vertically integrated programming service affiliated with AOL Time Warner. The WeB Channel consists mainly of entertainment programming that is broadcast in larger markets by the television affiliates of the "WB Network," but which is repackaged and carried on cable in mid-sized markets (markets smaller than the top 100). When this service was launched, then Time Warner, Inc. promised both its own cable operators and other major MSOs – including Comcast and Tele-Communications, Inc. (now AT&T) – that they could have exclusive access to it in their markets. Requests by both Knology and ClearSource to carry this service were therefore denied.

The programming on the WeB Channel proved highly popular with certain segments of the viewing public, and hundreds of Knology customers asked it to carry the channel. When they were told that Knology was unable to do so, many threatened to cancel their service. ClearSource, which at that time was just completing the build out of one of its first markets, feared a similar fate.

Consequently, in November 1999, Knology filed a program access complaint at the Commission to gain access to the WeB Channel. *See Knology Holdings, Inc. v. WB Television Network*, No. CSR-5458-P (complaint filed Nov. 24, 1999). Time Warner claimed that the service was not covered by the Commission's rules because, among other things, it had granted several non-vertically integrated third parties the right to distribute the programming to cable operators, and these parties had entered into the contracts granting the major MSOs their exclusivity. As alleged in Knology's complaint, however, these arrangements did not affect Time Warner's continuing control over the production and distribution of this programming, and the agreements with the MSOs (which Time Warner drafted) merely confirmed Time Warner's prior promises of exclusivity to them. *Id*.

Ultimately the proceeding was settled, and today both Knology and ClearSource carry the WeB Channel in the same markets their competitors do.

Texas Cable News Channel

For more than a year, BSPA members ClearSource and Grande Communications have been denied access to a satellite delivered programming service in a number of markets in Texas on the grounds that the incumbent in these markets – AOL Time Warner – has exclusive rights to it. This service, called Texas Cable News or TXCN,

features news programming of special interest to residents of that state, including certain coverage of local sports not available elsewhere.

TXCN is owned by a broadcaster that has no attributable interest in any cable systems, and thus insists that it is not required to provide this programming to AOL Time Warner's competitors. Yet, on the same day this broadcaster granted AOL Time Warner exclusive rights to this programming, these two companies also formed a partnership to create *other* cable news channels for Texas markets – including one of Grande's markets – beginning in 2002.

As a result, neither ClearSource nor Grande is able to gain access to this source of news for its customers today, and if the prohibition on exclusive programming contracts is allowed to expire, they will undoubtedly be prevented from obtaining the new programming services as well.

Midwest Sports Channel

Since 1998, BSPA member Astound Broadband ("Astound") made several attempts to obtain access to Midwest Sports Channel, a regional sports network carrying the television rights to the games of the Minnesota Twins, Minnesota Timberwolves, University of Minnesota football, basketball and hockey, as well as various St. Cloud University contests. When negotiating with the programmer, Astound advertised that it would soon carry the programming. During these two months of advertising "future site of MSC," Astound's subscribership increased 30%. However, Astound was later denied access when Midwest Sports Channel entered into an exclusive arrangement with the incumbent cable operator.

In the end, Astound was able to carry the programming network because Midwest Sports Channel was purchased by Fox Sports Network, a vertically integrated satellite delivered programming service. Accordingly, due to the program access rules, Midwest Sports Channel was forced to rescind its exclusive arrangement with the incumbent operator and Astound was able to offer the channel to its subscribers.

Metro Sports Channel

BSPA member Everest Midwest Licensee, LLC d/b/a Everest Connections Corporation ("Everest") has been unable to obtain access to Metro Sports Channel, a cable-affiliated, regional sports network owned and operated by Kansas City Cable Partners d/b/a Time Warner. Metro Sports Channel covers selected high school and regional college sporting events. Although Metro Sports Channel is a vertically integrated programming service, because Time Warner delivers the network terrestrially, thereby falling outside the scope of the discrimination and exclusivity provisions of the program access rules, Everest has been unable to obtain Metro Sports Channel to offer it to Everest's subscribers.

iN Demand/Diva

Everest has also been denied access to video-on-demand services iN Demand and Diva. When seeking carriage, Everest was told by both programmers that, because they were owned, in part, by Time Warner and Comcast, the networks were unable to provide service to competing MVPDs, including Everest.

Goodlife TV

Everest is currently in a dispute with Goodlife TV, a non-vertically integrated programmer, who recently entered into an exclusive arrangement with Kansas City Cable Partners (Time Warner). While Everest was once able to carry the network, due to this exclusive arrangement with the incumbent cable operator, Everest is no longer able to carry Goodlife TV on its system.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January 2002, a copy of the foregoing Reply Comments was served on each of the persons listed on the attached service list.

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